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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL JAMESON, ***Applicant,*** **vs.** **CLEVELAND BROWNS,** ***Defendant.***	**Case No. ADJ7093682** **(Santa Ana District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

On April 9, 2012, we granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the petition for reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant, Cleveland Browns, permissibly self-insured, filed a petition seeking reconsideration of the Amended Findings and Award and Order, issued January 30, 2012, in which a workers' compensation administrative law judge (WCJ) found applicant, Michael Jameson, sustained an industrial cumulative trauma injury over the period April 2001 to December 31, 2003,[1] to multiple parts of his body while employed as a professional football player. The WCJ found applicant's injuries caused 62% permanent disability and need for further medical treatment, and that his claim was not barred by the statute of limitations. The WCJ also imposed a $750.00 sanction against defendant's counsel "for submitting non-relevant voluminous documents."

Defendant contests the exercise of subject matter jurisdiction over applicant's cumulative trauma injury, contending that applicant was 'temporarily' employed in California under Labor Code section 3600.5(b), and was not 'regularly employed' as provided in section 3600.5(a). Defendant further raises

[1] The WCJ issued an amended Findings and Award and Order on January 30, 2012, without explanation, following service of the initial Findings and Award and Order on January 20, 2012. The only substantive change in the amended determination is in Finding of Fact number 3, where the WCJ found the date of injury to be through December 31, 2009, without changing Finding of Fact number 1, which found injury through December 31, 2003. In Finding of Fact number 4, the WCJ restated the findings as to the parts of the body injured.

an issue with the finding regarding its self-insured status and argues that the record should be reopened if the parties' stipulation to its self-insured status is not adequate to establish that fact. Finally, defendant contests the imposition of a sanction for filing extensive documents, asserting that the documents were relevant and were used to establish necessary elements of its case. Applicant has filed an answer to defendant's petition, and the WCJ has prepared a Report and Recommendation on Petition for Reconsideration.

For the reasons set forth below, as our decision after reconsideration we shall rescind the Amended Findings and Award and Order, and return this matter to the trial level for further proceedings and a new final decision.

I.

The issue presented is whether the Workers' Compensation Appeals Board may exercise subject matter jurisdiction over applicant's claim of cumulative trauma injury, when his employment as a professional football player in California involved a single football game out of 42 regular season games, one play-off game and numerous pre-season games, during a career spanning 2001 to 2004.

There is no dispute over certain preliminary facts.[2] The WCJ acknowledges that defendant was a self-insured employer at the time of injury. With regard to the requirements for exercising subject matter jurisdiction under section 3600.5(b), the WCJ states in his Opinion on Decision that applicant was hired outside of California, and that he was a temporary employee in California, since applicant only played one professional football game in California during his career.

However, the WCJ found defendant presented insufficient evidence to establish that it met the requirements under section 3600.5(b), since defendant did not provide admissible evidence of the relevant Ohio laws. He states at page 3 of his Opinion on Decision, that defendant "relies upon section 4123.54(H)(3) and (4) of the Ohio Revised Code, which is quoted in their Brief, but was not admitted into evidence, since Trial Briefs are merely argument and are not 'evidence.' The Brief also quotes Ohio cases, which also were not admitted into evidence in this case."

[2] In his Report and Recommendation on Petition for Reconsideration, the WCJ "concurs with all of the facts stated in the Petition for Reconsideration." (WCJ's Report at page 3.)

II.

The WCAB has jurisdiction over *all* injuries sustained in California (see Lab. Code, §§ 5300, 5301), with a single exception. That is, section 3600.5(b) provides:

> "Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing work for his employer if such employer has furnished workers' compensation insurance coverage under the workers' compensation insurance or similar laws of a state other than California, so as to cover such employee's employment while in this state; provided, the extraterritorial provisions of this division are recognized in such other state and provided employers and employees who are covered in this state are likewise exempted from the application of the workers' compensation insurance or similar laws of such other state. The benefits under the Workers' Compensation Insurance Act or similar laws of such other state, or other remedies under such act or such laws, shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state.
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> "A certificate from the duly authorized officer of the appeals board or similar department of another state certifying that the employer of such other state is insured therein and has provided extraterritorial coverage insuring his employees while working within this state shall be prima facie evidence that such employer carries such workers' compensation insurance."

Thus, under section 3600.5(b), the laws of a state other than California provide the exclusive remedy for an employee hired outside of California[3] but injured while working here, if the following conditions are satisfied: (1) the employee is only working "temporarily" in California; (2) the employer furnishes workers' compensation insurance under the "similar" laws of another state; (3) the other state's workers' compensation laws cover the employee's work in California, and (4) the other state recognizes California's extraterritorial provisions and likewise exempts California employers and employees covered by California's workers' compensation laws from application of the laws of the other state. The certificate described in the last paragraph of section 3500.5(b) would provide prima facie evidence that condition number two has been satisfied. Here, defendant offered into evidence a "Certificate of Employer's Right to Pay Compensation Directly," but withdrew that evidence upon stipulation of the parties that defendant was self-insured.

[3] As noted, it is undisputed that applicant was hired outside of California.

In his Report and Recommendation on Petition for Reconsideration, the WCJ explained the reason he found defendant failed to establish the necessary precondition for finding the absence of subject matter jurisdiction.

> "If the Cleveland Browns had workers' compensation insurance, they would have had to have insurance under the Ohio State Insurance Commission, which has previously been found not to be liable for any California workers' compensation claims. No evidence was produced, or any information offered in the Defense's trial brief, that cited any cases where a self-insured team from Ohio is exempt from any liability for a California workers' compensation injury. No evidence has been offered that if California did not take jurisdiction over this matter, the applicant would be entitled to any workers' compensation benefits, so that a denial of California jurisdiction may mean that the applicant could have an injury without an adequate and just remedy." (WCJ's Report, at page 4.)

In its trial brief, defendant provided citations to Ohio workers' compensation law, including statutory and case law, to establish that Ohio's insurance coverage meets the coverage and reciprocity requirements of section 3600.5(b).[4] In the recent decision in *Booker v. Cincinnati Bengals* (ADJ4661829), issued February 8, 2012, a panel concluded that the Workers' Compensation Appeals Board lacked subject matter jurisdiction for cumulative trauma injuries sustained by a professional football player employed in Ohio who played a single game in California. The panel determined, based upon an analysis of relevant insurance coverage and reciprocity provisions of Ohio law, that the employer's insurance and Ohio workers' compensation law met the requirements of section 3600.5(b).

In this case, the Findings of Fact failed to address the issue raised at trial whether defendant had established the requirements of section 3600.5(b) to exclude workers' compensation coverage for employees temporarily employed in California. While the WCJ addressed the issue in his Opinion on Decision, he neglected to make any relevant findings in his final determination, and did not consider the defendant's citation to the relevant Ohio law.

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[4] There should be no issue as to whether the WCJ should take judicial notice of Ohio statutes and case law, given that these matters are essential to a determination of our subject matter jurisdiction. Evidence Code section 452(a) provides that judicial notice may be taken of "the decisional, constitutional, and statutory law of any state of the United States . . ." Though a party may request judicial notice, Evidence Code section 454(a)(1) indicates that a court "in determining the propriety of taking judicial notice" may take notice of "any source of pertinent information . . . whether or not furnished by a party." The WCJ should ascertain whether the cited statutes and case law are the relevant and applicable law of Ohio. Given the informality of workers' compensation proceedings in California, the citations should be considered without more.

We shall rescind the Amended Findings and Award and Order and return this matter to the trial court, whereupon the WCJ should permit defendant to submit any relevant evidence to establish that its self-insurance covers applicant's out-of-state claim of injury, review the relevant law and make a determination as to whether the Workers' Compensation Appeals Board may exercise subject matter jurisdiction in this case.

III.

Should the WCJ find that the Workers' Compensation Appeals Board may exercise subject matter jurisdiction, there are additional issues arising from the WCJ's determination that require further consideration.

First, the WCJ has made contradictory findings with regard to the date of injury. The Application for Adjudication of Claim claimed a cumulative trauma injury from January 1, 2002 through December 31, 2003. At trial on November 17, 2011, the parties stipulated that applicant was claiming injury from April 2001 to approximately December 31, 2003, and was permanent and stationary as of October 5, 2005. Applicant testified that he stopped working for the Cleveland Browns in 2004 and was released in 2005. The WCJ found applicant sustained a cumulative trauma from April 2001 to December 31, 2003, and from April 2001 to December 31, 2009. Nowhere in his findings or Opinion on Decision does the WCJ explain the factual basis for his finding of injury for the period ending December 31, 2009.

With regard to the imposition of a sanction against defendant of $750 under section 5813 for filing voluminous records from applicant's employment, the WCJ's failure to give defendant notice of his intention to impose a sanction deprived defendant of due process of law. A sanction may be imposed by a WCJ on his own motion, provided the party receives notice and an opportunity to respond through a written objection. (See *Escamilla v. Workers' Comp. Appeals Bd.* (*Crumpton*) (2008) 73 Cal.Comp.Cases 280 [writ denied].) In the absence of such notice, the sanction cannot stand.

Furthermore, the issue of whether defendant's conduct constitutes sanctionable "bad faith action or tactics that are frivolous or solely intended to cause unnecessary delay," requires the WCJ to determine that defendant's submission of applicant's records was "done for an improper motive or is indisputably without merit." (WCAB Rule 10561.) Absent a finding that defendant submitted

unnecessary or irrelevant records in bad faith, defendant should not be subject to a sanction.

Accordingly, we shall rescind the Amended Findings and Award and Order, and return this matter to the trial level for further proceedings and for a new final determination.

For the foregoing reasons,

IT IS ORDERED that as our Decision After Reconsideration, the Amended Findings and Award and Order, issued January 30, 2012, is **RESCINDED**, and the matter shall be **RETURNED** to the trial level for further proceedings and a new final decision.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

ALFONSO J. MORESI

RONNIE G. CAPLANE

WORKERS' COMPENSATION APPEALS BOARD SEAL

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APR 20 2012

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

MICHAEL JAMESON
LAW OFFICE OF RON MIX
SEYFARTH SHAW

SV/jp

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL JAMESON, ***Applicant,*** **vs.** **CLEVELAND BROWNS,** ***Defendant.***	**Case No. ADJ7093682** **(Santa Ana District Office)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

Reconsideration has been sought by defendant with regard to a decision filed on January 30, 2012.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted in order to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereinafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration be, and it hereby is, **GRANTED**.

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IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above case, all further correspondence, objections, motions, requests and communications shall be filed with the Workers' Compensation Appeals Board, P. O. Box 429459, San Francisco, California 94142-9459, **ATTENTION**: Office of the Commissioners, and not with any local office.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

ALFONSO J. MORESI

RONNIE G. CAPLANE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APR 0 9 2012

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

MICHAEL JAMESON
LAW OFFICE OF RONALD MIX
SEYFARTH SHAW

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STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
WORKERS COMPENSATION APPEALS BOARD

Case Numbers: ADJ7093682

MICHAEL JAMESON **-vs-** **CLEVELAND BROWNS**

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: LEONARD J. SILBERMAN

JOINT REPORT AND RECOMMENDATION OF WORKER'S COMPENSATION ADMINISTRATIVE LAW JUDGE

1. Identity of Petitioner: Defendant

2. Timeliness: The Petition was timely filed

3. Verification: The Petition was properly verified

4. Petitioner's contentions:

1. The Court erred in stating in the Findings of Fact that the Cleveland Browns were not self-insured for this industrial injury.

2. There is no subject matter jurisdiction over this claim based upon Labor Code section 3600.5(b).

3. The Court erred in assessing sanctions against the defense counsel.

DISCUSSION

I.

The Petitioner contends that The Court erred in stating in the Findings of Fact that the Cleveland Browns were not self-insured for this industrial injury.

The Petition states that the Court erred in making a Finding of Fact that the Cleveland Browns were not self-insured for workers' compensation at the time of this injury.

In reviewing the Amended Findings of Fact which issued on January 30, 2012, the caption and the text of the Findings of Fact does not identify any insurance company and there is no indication that the Cleveland Browns were not self-insured for this injury. The Award is found solely against the Cleveland Browns, so it should be clear that the Cleveland Browns were self-insured at the time of this industrial injury.

The Petitioner refers to one line in the Opinion on Decision where the Court made an analogy if the Cleveland Browns had insurance coverage in Ohio. The facts are clear that the Cleveland Browns were self-insured in this matter.

II.

The Petitioner contends that there was no subject jurisdiction pursuant to Labor Code section 3600.5(b).

The applicant played one game as a professional football player for the Cleveland Browns in California. That was on September 21, 2003. Since the applicant played in that game, and paid California taxes, the California Courts should be protective of California taxpayers and extend their jurisdiction to them to protect their rights as given to them by the California Legislature.

The Court concurs with all of the facts stated in the Petition for Reconsideration.

The Cleveland Browns moved that this case had to be dismissed in that out of the 42 games the applicant played in the National Football League, only one game was played in California which was on September 21, 2003, he resided in Texas the entire length of his football career, he was represented by a New York agent and during his entire career the Cleveland Browns were self-insured under the State of Ohio.

The Defense relies upon *Labor Code section 3600.5 (b)* which states that:

b) Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing work for his employer if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation insurance or similar laws of a state other than California, so as to cover such employee's employment while in this state; provided, the extraterritorial provisions of this division are recognized in such other state and provided employers and employees who are covered in this state are likewise exempted from the application of the workmen's compensation insurance or similar laws of such other state. The benefits under the Workmen's Compensation Insurance Act or similar laws of such other state, or other remedies under such act or such laws, shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state.

The Defense relies upon section 4123.54 (H)(3) and (4) of the Ohio Revised Code, which is quoted in their Brief, but was not admitted into evidence, since Trial Briefs are merely argument and are not 'evidence'.

The Brief also quotes Ohio cases, which also were not admitted into evidence in this case.

This court can only rely upon the record that has been established in this case for making its decision.

The Court must therefore analyze the basic tenets of *Labor Code section 3600.5(b)* to determine if all the requirements have been met to find that there is no subject matter jurisdiction in California, since every effort must be made to insure that California employees are entitled to their workers' compensation rights.

The first test is that the employee must be hired outside California. The applicant resided in Texas, his Agent was in New York, and he was hired by an Ohio team. It is found that the applicant was hired outside of California.

The second test is whether the applicant is a permanent or temporary employee. Since the applicant only played one game in California, it is found that the applicant was a temporary employee in California.

The third test is did the employer furnish workers' compensation benefits in another State which would cover his employment in California. If the Cleveland Browns had workers' compensation insurance, they would have had to have insurance under the Ohio State Insurance Commission, which has previously been found not to be liable for any California workers' compensation claims. No evidence was produced, or any information offered in the Defense's trial brief, that cited any cases where a self-insured team from Ohio is exempt from any liability for a California workers' compensation injury. No evidence has been offered that if California did not take jurisdiction over this matter. the applicant would be entitled to any workers' compensation benefits, so that a

denial of California jurisdiction may mean that the applicant could have an injury without an adequate and just remedy.

The fourth test is if the employer was self-insured for workers' compensation, which they were in this matter.

The Court must take into consideration *Labor Code section 3202* which states:

This division and Division 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.

An overriding policy issue is that when the applicant played in the game in California, he was compelled by California law to pay taxes on the earnings for that California game. Considering the salaries of professional football players, even though he only played one game in California, that taxed salary may be greater than the median of salaries paid to California employees on a yearly basis.

The Court has found little guidance in the form of California case law on this issue.

In *Vaughn Booker v. the Cincinnati Bengals,*(2011) ADJ4661829, the Santa Ana DWC Presiding Judge, Norman Deleterre, held that playing in California and paying California personal income tax on his income he received for playing in California was sufficient contacts to establish California jurisdiction.

In *Cleveland Crosby v. Baltimore Colts* (2001) 29 CWCR 182, it was held that when a professional football player played one game in California, that this fact alone was sufficient to confer California jurisdiction.

In *Rocor Transportation v. WCAB (2001),* 66 CCC 1136, it was held that a long haul truck driver who spent less than ten percent of his employment in California established enough California contacts to confer jurisdiction on California.

In *CNA Insurance Company v. WCAB (Foote/Huckins)* (1987) 52 CCC 439 (writ denied), it was held that California did have jurisdiction over two long haul truck drivers who lived in Oregon, who entered into their contract in Oregon, and whose injuries were sustained in Wisconsin.

Looking at the opposite side of the coin, in *Sustarich v. WCAB* (2001) 66 CCC 967 (writ denied) it was held that when a Flight Attendant entered into a contract with United Airlines outside of California and she was injured from an attack at a hotel in Germany, there was not jurisdiction because she did not have regular employment in California when she sustained a specific injury in a foreign country.

III.

The Petitioner contends that the sanctions Order against the defense counsel should be rescinded.

This Court Ordered a sanction against the Defense Counsel for submitting 394 pages of irrelevant documents into the record.

The Petitioner states that in the cross-examination of the applicant, one letter was utilized out of the 394 submitted pages to prove that the applicant retained an attorney in Ohio. The applicant readily admitted this fact, and the letter was not needed to refresh his recollection. Even if this was needed in preparation of the cross-examination, it was only one page in contrast to the 394 pages submitted into evidence.

The Petitioner states that the exhibits contained contracts showing that the applicant lived out of state (Texas), and retained an out of state agent. These are facts that were stipulated to at the onset of the trial and documents were not needed to prove these undisputed facts.

The Petitioner contends that these exhibits were in regards to issues of permanent disability, apportionment and need for future care. They were not utilized to prove or disprove any of these issues and were already reviewed by the forensic specialists, so they were simply duplicative of the evidence that had been already submitted into the record.

The Petitioner states that reference was made to the deposition to refresh the applicant's recollection of the name of the attorney in Ohio. There was no need to submit the entire transcript, when one page would have sufficed, if that was even needed once the applicant testified.

> The Court found that there was not any justification for placing all of these documents into evidence, other than try to confuse the record, create needless work for the Court, and, under the EAMS system, to create needless time for the Court Reporter to scan and complete all of these documents that were not ever utilized in these proceedings.
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> A signal needs to be sent to the Defense that they should not just 'dump' records on the Court when they do not have any probative value. It should be the duty of the parties and not the Court to submit relevant documents on the issues raised and not cause undue delay and hardship pursuant to *Labor Code section 5813*.

RECOMMENDATION

The Petitioner is correct that the jurisdictional issue is such a pressing issue in the hundreds of sports cases coming before the Workers' Compensation Appeals Board and their Courts that an *en banc* decision should be made to clarify these issues.

DATE: February 27, 2012

Leonard J. Silberman

Leonard Silberman
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on all parties listed below on the above date.

BY: Edna O Peña